

## PROSKAUER ROSE LLP

1233 Twentieth Street NW  
Suite 800  
Washington, DC 20036-2396  
Telephone 202.416.6800  
Fax 202.416.6899

NEW YORK  
LOS ANGELES  
BOCA RATON  
NEWARK  
PARIS

**Bruce E. Boyden**  
Attorney at Law

Direct Dial 202.416.6847  
bboyden@proskauer.com

November 16, 2004

### **FILED ELECTRONICALLY**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street SW, Room TW-A325  
Washington, DC 20554

Re: Ex Parte Presentation in MB Docket No. 02-230 (Digital Broadcast Content Protection)

Dear Ms. Dortch:

Scientific Atlanta has submitted a proposal to the Commission in the above-referenced docket to offer a new, uncertified digital output protection technology for use with digital television receivers covered by the Commission's Broadcast Flag regulation, 47 C.F.R. § 73.9000 *et seq.*<sup>1</sup> In support of its proposal, Scientific Atlanta cites the provisions concerning encrypted retransmission, the "sole control" exception for digital outputs, and implied content-owner approval in other venues. For the reasons stated below, however, the Commission should reject Scientific Atlanta's interpretation of the Commission's order and the regulation and require Scientific Atlanta to either fit its technology within one of the existing exceptions, or submit its technology for certification.

As reflected in its July 13 *ex parte*, Scientific Atlanta proposes a multi-room DVR system that applies 3DES encryption to unencrypted Marked Content in the subscriber's set top box that evidently uses the device certificates associated with Scientific Atlanta's PowerKEY Conditional Access System (CAS). The PowerKEY CAS is one of the scrambling systems used by cable operators to encrypt at the head end pay television and other programming services for delivery to subscribers' set top boxes. According to the proposal, the 3DES encrypted Marked Content

---

<sup>1</sup> See Letter from Deborah Lathen, Lathen Consulting LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 02-230 (July 13, 2004).

Ms. Marlene H. Dortch

November 16, 2004

Page 2

would be recorded onto the receiving set top box's DVR and could be retransmitted over coaxial cable to other PowerKEY-enabled set top boxes. Scientific Atlanta believes that its consumer set top box encryption technology described in its proposal should be exempt from the certification process.<sup>2</sup>

Scientific Atlanta cites Paragraph 58 of the Commission's Report and Order adopting the Broadcast Flag regulation in support of its position. Paragraph 58, however, explains the difference between encrypted and unencrypted retransmission by an MVPD *from the head end* to the consumer's receiver under Section 76.1909(b) and (c). For example, Section 76.1909(b), concerning encrypted retransmission, clearly contemplates retransmissions of broadcast content by "a multichannel video program distributor . . . to the consumer product used to decrypt the distributor's signal information." It has nothing whatever to do with redistribution of content from one consumer product to another such product at the direction of the consumer after the decryption of the signal information. Section 76.1909(b) cannot possibly exempt Scientific Atlanta's consumer set top box encryption technology because the consumer is not an MVPD.

Nor do Sections 73.9003(a)(5) and 73.9004(a)(4) exempt Scientific Atlanta's technology from certification, as we understand the technology. Those two sections permit an output from a Covered Demodulator Product where the content is output "to another product and such Covered Demodulator Product exercises sole control (such as by using a cryptographic protocol), in compliance with the Demodulator Robustness Requirements, over the access to such content in usable form in such other product." Scientific Atlanta cites only NCTA's Petition for Reconsideration in support of this argument.<sup>3</sup> But as the MPAA has argued in response to NCTA's petition, the NCTA's understanding of the "sole control" exception is clearly flawed.<sup>4</sup> If the "sole control" exception allows Robust Method transfers generally around a home network, the entire certification process would be unnecessary. For example, Scientific Atlanta's consumer set top box encryption technology appears to be a secure home networking technology similar in most respects to other content protection technologies that have sought FCC certification for use with digital broadcast content. Thus, if Covered Demodulator Products incorporating Scientific Atlanta's consumer set top box encryption technology *ipso facto* exercise "sole control" over downstream products, so would products incorporating every other output protection technology that has been certified so far. Certification would become an unnecessary exercise. The Commission must not allow the definition of "sole control" to be stretched so far.

---

<sup>2</sup> See *id.*, Attachment at 2.

<sup>3</sup> See Petition for Reconsideration or Clarification of NCTA, MB Docket No. 02-230, at 6-10 (filed Jan. 2, 2004).

<sup>4</sup> See Opposition of the MPAA, et al., MB Docket No. 02-230, at 6-9 (filed Mar. 10, 2004).

Ms. Marlene H. Dortch  
November 16, 2004  
Page 3

A much more reasonable interpretation of the “sole control” provisions is that they complement the immediately preceding exceptions, Sections 73.9003(a)(4) and 73.9004(a)(3), concerning output for the purpose of a recording. Sections 73.9003(a)(4) and 73.9004(a)(3) permit digital outputs that are not protected with an authorized digital output protection technology, *if* the content is instead protected with an authorized recording method pursuant to 73.9003(b)(2) or 73.9004(b)(2). Similarly, the “sole control” provisions allow Robust Method transfers to passive, peripheral devices such as external hard drives for purposes of storing “bound” recordings under Sections 73.9003(b)(1) or 73.9004(b)(1). Such peripheral devices are so tightly controlled by the Covered Demodulator Product that they might as well be within the product itself, and therefore a Robust Method transfer is appropriate. The MPAA proposed a definition of “sole control” in its opposition to the NCTA’s petition that would clarify this aspect of the regulation.<sup>5</sup>

Finally, Scientific Atlanta has suggested to the Commission that the fact that its PowerKEY CAS is used to protect high-value content over cable operators’ systems with content owners’ implicit consent should allow Scientific Atlanta to avoid the certification process for its PowerKEY-based consumer set top box encryption technology.<sup>6</sup> This concept, however, if accepted by the Commission, would undermine the entire structure of the regulation. It was anticipated and expected that technologies already approved by content owners and in use for high-value content in other venues would be submitted for certification under the regulation.<sup>7</sup> Indeed, that is precisely what has occurred. There is no reason why Scientific Atlanta should be exempt from this process, if its technology does not fit within one of the existing exceptions.

Although the PowerKEY CAS is being used by cable operators at their head ends, Scientific Atlanta’s adaptation of this technology in its proposed consumer set top box encryption technology cannot be assumed to operate similarly to the PowerKEY CAS. The Commission has already recognized that such adaptations may have material impacts on protection technologies; that is why it decided against “blanket approvals” of technologies for all transports.<sup>8</sup> Under both the MPAA’s proposed marketplace criteria, as well as the interim criteria adopted by the Commission, there are no exceptions to certification for technologies in widespread use by cable operators.<sup>9</sup> If its technology is not subject to an exception, Scientific

---

<sup>5</sup> See *id.* at 5.

<sup>6</sup> See, e.g., Letter from Lathen to Dortch, Attachment at 2.

<sup>7</sup> See Broadcast Flag Order ¶ 14.

<sup>8</sup> See Certification Order ¶ 68.

<sup>9</sup> Indeed, under the MPAA’s proposed marketplace criteria, such widespread use in other venues is the *basis* for certification, not the basis for an exception from certification.

PROSKAUER ROSE LLP

Ms. Marlene H. Dortch

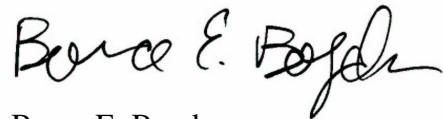
November 16, 2004

Page 4

Atlanta should submit a certification for its consumer set top box encryption technology detailing how the technology will protect digital broadcast content, the scope of redistribution it will permit, compliance and robustness rules, and all of the other necessary and important features of a digital output protection technology, so that its technology can be vetted by the Commission and be subject to public review and comment.

In accordance with Section 1.1206 of the Federal Communications Commission rules, one copy of this notice is being filed electronically.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce E. Boyden". The signature is fluid and cursive, with the first name "Bruce" and last name "Boyden" clearly distinguishable.

Bruce E. Boyden

*Counsel to the Motion Picture Association of America, Inc.*

cc: W. Kenneth Ferree  
William Johnson  
Rick C. Chesson  
Steven Broeckaert  
Alison Greenwald  
Michael Lance  
Susan Mort  
Mary Beth Murphy  
Amy Nathan